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SEC and FINRA Withdraw Broker-Dealer Digital Asset Security Custody Statement

SEC Also Publishes FAQs on Broker-Dealer Financial Responsibility and Transfer Agent Regulations

On May 15, 2025, the staffs of the Division of Trading and Markets (the “Division Staff”) of the Securities and Exchange Commission (“SEC”) and the Office of the General Counsel of the Financial Industry Regulatory Authority, Inc. (“FINRA”) withdrew, effective immediately, their joint statement regarding broker-dealer custody of digital asset securities (the “2019 Statement”).¹ The 2019 Statement responded to questions posed by market participants regarding the application of federal securities laws and FINRA rules to broker-dealers’ intermediation (including custody) of digital asset securities and transactions.² The 2019 Statement had provided that “the application of the federal securities laws, FINRA rules and other bodies of laws to digital assets, digital asset securities and related innovative technologies raise novel and complex regulatory and compliance questions and challenges.”³ In the view of many market participants, the 2019 Statement was intended to caution broker-dealers that it may not be possible for them to comply with the federal securities laws and regulations in the context of digital assets.⁴

Simultaneously, the Division Staff issued a set of responses to frequently asked questions regarding crypto asset activities and distributed ledger technology (“FAQs”).⁵ The 10 FAQs essentially revised the Division Staff’s position on digital assets and addressed broker-dealer financial responsibility and transfer agent regulations, including:

- **Application of the SEC’s Customer Protection Rule (SEC Rule 15c3-3):**⁶ The Customer Protection Rule imposes requirements on broker-dealers that are designed to protect customer funds and securities and (together with other statutes and regulations) ensure that customer assets are protected from the failure of a broker-dealer. A broker-dealer must segregate customer assets from the broker-dealer’s proprietary assets by maintaining “possession or control” over customers’ fully-paid and excess margin securities (e.g., by custodying them in a “no-lien” account at a bank or clearing agency)⁷ and

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depositing cash in a special reserve account for customers.⁸ The FAQs provide guidance regarding the application of the Customer Protection Rule in the context of crypto assets.

- **Possession or Control Requirement:** FAQ 1 confirms that the Rule’s possession or control requirement does not apply to crypto assets that are not securities. Accordingly, the Rule will not dictate how or where a broker-dealer could custody (including self-custody on a blockchain) Bitcoin and other non-security crypto assets for customers, although other rule sets (e.g., state laws) may still be relevant;
- **“Control” of Securities:** Rule 15c3-3(c) sets out the circumstances under which a broker-dealer has “control” over securities. One such circumstance is where the securities are certificated and the certificates are in the custody or control of a clearing corporation or other subsidiary of a national securities exchange or custodian bank in accordance with a system for the central handling of securities (i.e., a central securities depository).⁹ FAQ 2 provides that a broker-dealer may establish “control” of crypto asset securities even “if such crypto asset securities are not in certificated form,” provided that such crypto asset securities are “held at an otherwise qualifying control location” (e.g., at a bank or another broker-dealer). This FAQ is important because Division Staff had previously questioned whether adequate “control” could be established for crypto asset securities held by a bank for a broker-dealer’s customers;¹⁰ and
- **Special Purpose Broker-Dealer Custody Guidance:** FAQ 3 provides that compliance with the SEC’s 2020 statement regarding special purpose broker-dealers (the “SPBD Statement”)¹¹—which provides a temporary safe harbor for broker-dealers that custody only crypto asset securities (but not other types of securities or crypto assets) and comply with the other requirements in the SPBD Statement—is not required because a broker-dealer can establish control of crypto asset securities as described above. The SPBD Statement also provided that control can be established if the broker-dealer “has access to the digital asset securities and the capability to transfer them on the associated distributed ledger technology.”¹² Broker-dealers that prefer to establish control in this manner may still need to rely on the SPBD Statement to do so. The SPBD Statement expires on April 27, 2026.
- **Facilitating In-Kind Creations and Redemptions in Connection with a Spot Crypto ETP:**¹³ FAQ 4 states that the SEC’s broker-dealer custody and capital requirements do not prohibit a broker-dealer from facilitating in-kind creations and redemptions in connection with a spot crypto ETP. However, in doing so, broker-dealers may take proprietary positions in the crypto assets underlying the ETP creations and redemptions that they are facilitating. FAQ 4 notes that “broker-dealers taking proprietary positions in the assets underlying an ETP would need to account for those assets as part of their net capital calculations.” Rule 15c3-1 (the “Net Capital Rule”) generally requires a broker-dealer to deduct specified amounts from its net capital for any proprietary positions, including the full value of proprietary positions that are not readily marketable.¹⁴ But the FAQ states that the Division Staff “will not object if a broker-dealer treats a proprietary position in bitcoin or ether as being readily marketable for purposes of determining whether the 20% haircut applicable to commodities under Appendix B of [SEC] Rule 15c3-1 applies.” The SEC had previously provided that all crypto assets that are not securities would be subject to a 100% deduction for net capital purposes.¹⁵
- **Securities Investor Protection Act of 1970 (“SIPA”) and Securities Investor Protection Corporation (“SIPC”) Matters:**¹⁶ The FAQs (1) confirm that crypto asset investment contracts that are not the subject of registration statements filed under the Securities Act of 1933 are not “securities” for purposes of SIPA, and therefore SIPC would not protect customer claims for such assets in the event of a broker-dealer’s bankruptcy, and (2) provide that it could be possible for a broker-dealer to help ensure that its customers’ non-security crypto assets would be returned to such customers upon the broker-dealer’s insolvency notwithstanding the inapplicability of SIPC protection. Specifically, a broker-dealer could do so by “agree[ing] with its customers that non-security crypto assets custodied by the broker-dealer for the customers for purposes of Article 8 of the Uniform Commercial Code be treated as ‘financial assets’ carried in a ‘securities account,’ as those terms are defined in Article 8” in order to “help ensure that customer non-security crypto assets do not become part of the broker-dealer’s estate if the broker-dealer is placed in liquidation under SIPA or the Bankruptcy Code.” However, FAQ 7 cautions that “[n]on-security crypto assets are not protected by SIPA and may not be protected by any

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other specific insolvency regime, and customers may be exposed to loss of such assets in the event of an insolvency.”

- **Recordkeeping:**¹⁷ Given that “prudent recordkeeping practices [are] essential for investor protection in the operation of a broker-dealer, to perform an audit or examination of the broker-dealer, and for a trustee appointed under SIPA or otherwise to liquidate the broker-dealer,” FAQ 8 states that a broker-dealer conducting a non-security crypto asset business “could” help ensure adequate records are made and preserved by “mak[ing] and keep[ing] the same records for its non-security crypto activities as it does for its securities activities.”
- **Transfer Agent Requirements:**¹⁸ The FAQs also provide guidance regarding transfer agent registration requirements and the use of distributed ledger technology.
 - **Registration:** FAQ 9 states that a person acting as a transfer agent for an issuer of a crypto asset that is a security that is registered under Section 12 of the Securities Exchange Act of 1934 (the “Exchange Act”)—or that would be required to register but for the registration exemptions under Section 12(g)(2)(B) or 12(g)(2)(G) of the Exchange Act¹⁹—may be required to register as a transfer agent if such person engages in any of the five activities enumerated in Section 3(a)(25) of the Exchange Act on behalf of an issuer (or itself as an issuer) of securities.²⁰
 - **Use of Distributed Ledger Technology:** A registered transfer agent may utilize distributed ledger technology as its official Master Securityholder File, as defined under Exchange Act Rule 17Ad-9(b), provided that the transfer agent complies with all other applicable requirements under federal securities laws (including those related to recordkeeping, reporting and examination).²¹ This guidance, taken together with state laws authorizing issuers to maintain securities ledgers on blockchain, may facilitate the use of blockchain-based ledgers as the primary, or only, record of stock ownership by some issuers, so long as recordkeeping requirements applicable to relevant intermediaries do not preclude this approach.

The Division Staff highlighted that it “welcomes questions about the application of the [SEC’s] transfer agent rules to crypto asset activities and distributed ledger technology” and “also welcome[s] requests for other assistance (including requests for interpretive or no-action letters) relating to these issues and questions.”

The withdrawal of the 2019 Statement and issuance of the FAQs follow recent remarks by newly appointed SEC Chairman Paul Atkins which stated, among other topics, the possible need to repeal and replace the SPBD Statement.²² These actions are also consistent with other recent crypto-friendly actions taken by the SEC and other financial markets regulators. For additional information on those actions, please refer to our recent Client Memoranda.²³

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ENDNOTES

- 1 SEC Division of Trading and Markets, *Withdrawal of Joint Staff Statement on Broker-Dealer Custody of Digital Asset Securities* (May 15, 2025), https://www.sec.gov/newsroom/speeches-statements/withdrawal-joint-staff-statement-broker-dealer-custody-digital-asset-securities?utm_medium=email&utm_source=govdelivery#_ftnref1.
- 2 SEC Division of Trading and Markets and FINRA Office of General Counsel, *Joint Staff Statement on Broker-Dealer Custody of Digital Asset Securities* (July 8, 2019), <https://www.sec.gov/newsroom/speeches-statements/joint-staff-statement-broker-dealer-custody-digital-asset-securities>.
- 3 *Id.*
- 4 See *id.* (“[T]he ability of a broker-dealer to comply with aspects of the Customer Protection Rule is greatly facilitated by established laws and practices regarding the loss or theft of a security, that may not be available or effective in the case of certain digital assets”).
- 5 SEC Division of Trading and Markets, *Frequently Asked Questions Relating to Crypto Asset Activities and Distributed Ledger Technology* (May 15, 2025), <https://www.sec.gov/rules-regulations/staff-guidance/trading-markets-frequently-asked-questions/frequently-asked-questions-relating-crypto-asset-activities-distributed-ledger-technology>.
- 6 FAQs 1-3.
- 7 See 17 C.F.R. § 240.15c3-3(b)-(c).
- 8 See 17 C.F.R. § 240.15c3-3(e).
- 9 17 C.F.R. § 240.15c3-3(c)(1).
- 10 2019 Statement, *supra* note 2 (“There are many significant differences in the mechanics and risks associated with traditional securities and digital asset securities Consequently, a broker-dealer must consider how it can, in conformance with Rule 15c3-3, hold in possession or control digital asset securities.”).
- 11 Press Release, *SEC Issues Statement and Requests Comment Regarding the Custody of Digital Asset Securities by Special Purpose Broker-Dealers* (Dec. 23, 2020), <https://www.sec.gov/newsroom/press-releases/2020-340>.
- 12 SEC Statement, *Custody of Digital Asset Securities by Special Purpose Broker-Dealers*, 86 Fed. Reg. 11627, 11631 (Feb. 26, 2021).
- 13 FAQ 4.
- 14 17 C.F.R. § 240.15c3-1.
- 15 See SEC Final Rule, *Further Definition of “As a Part of a Regular Business” in the Definition of Dealer and Government Securities Dealer in Connection with Certain Liquidity Providers*, 89 Fed. Reg. 14938, 14988 (Feb. 29, 2024) (“For market participants engaging in dealing activity, other than private funds, the Net Capital Rule may require additional capital. We anticipate the costs associated with the Net Capital Rule to vary according to the type of investment. For example, less liquid investments and derivatives positions are subject to greater haircuts [], and will thus require more capital. Crypto assets that are not securities would be subject to a 100% deduction when computing net capital and so affected persons that hold more of such assets would likely need more net capital.”) (citations omitted).
- 16 FAQs 5-7.
- 17 FAQ 8.
- 18 FAQs 9-10.

ENDNOTES (CONTINUED)

- 19 These securities would include certain securities issued by a registered investment company or an insurance company.
- 20 The person would be required to register as a transfer agent with the SEC or, if a bank, with the relevant federal banking regulator.
- 21 FAQ 10 (“Staff understands that some transfer agents’ master securityholder files comprise multiple files or systems. In the context of distributed ledger technology, this may mean that transaction information, such as wallet address, asset balance, ownership percentage, number of shares or units, date of purchase, and transaction ID, is maintained on a blockchain while personal information, like the investor’s name, investor ID, address and other contact information, Tax ID or social security number, and other identifying or non-public information, is kept off-chain within the transfer agent’s proprietary systems.”). The Division also noted that, in its view, “provided the transfer agent ensures that its records are at all times secure, accurate, up-to-date, produceable to the [SEC] and its staff in an easily-readable format, and maintained for the required time periods under the rules, the specific technology, systems or files that comprise the records would generally be within the transfer agent’s discretion.”
- 22 Chairman Atkins, *Keynote Address at the Crypto Task Force Roundtable on Tokenization* (May 12, 2025), https://www.sec.gov/newsroom/speeches-statements/atkins-remarks-crypto-roundtable-to-kenization-051225#_ftn10.
- 23 See, e.g., S&C Memo, *FDIC Simplifies Process for Banks to Engage in Crypto-Related Activities* (Apr. 2, 2025), available at <https://www.sullcrom.com/SullivanCromwell/Assets/PDFs/Memos/FDIC-Simplifies-Process-Banks-Engage-Crypto-Activities.pdf>; S&C Memo, *OCC Clarifies Permissible Crypto-Asset Activities* (Mar. 9, 2025), available at <https://www.sullcrom.com/SullivanCromwell/Assets/PDFs/Memos/OCC-Clarifies-Permissible-Crypto-Asset-Activities.pdf>; S&C Memo, *SEC Staff Issues Stablecoin Guidance* (Apr. 14, 2025), available at <https://www.sullcrom.com/SullivanCromwell/Assets/PDFs/Memos/SEC-Staff-Issues-Stablecoin-Guidance.pdf>; S&C Memo, *CFTC Staff Seeks Public Comment on 24/7 Trading and Perpetual Derivatives* (Apr. 21, 2025), available at <https://www.sullcrom.com/SullivanCromwell/Assets/PDFs/Memos/CFTC-Staff-Seeks-Public-Comment-24-7-Trading-Perpetual-Derivatives.pdf>; S&C Memo, *Federal Reserve Board and FDIC Withdraw Crypto-Asset Activities Guidance* (Apr. 25, 2025), available at <https://www.sullcrom.com/SullivanCromwell/Assets/PDFs/Memos/Federal-Reserve-Board-FDIC-Withdraw-Crypto-Asset-Activities-Guidance.pdf>; S&C Memo, *OCC Clarifies Bank Authority to Engage in Crypto Custody and Execution Services* (May 9, 2025), available at <https://www.sullcrom.com/SullivanCromwell/Assets/PDFs/Memos/OCC-Clarifies-Bank-Authority-Engage-Crypto-Custody-Execution-Services.pdf>.

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